

AUG 17 1979

IN THE

MICHAEL RODAK, JR., CLERK

**Supreme Court of the United States**

OCTOBER TERM, 1979

**No. 79-101**

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BARBARA BLUM, Individually and as Commissioner of the  
New York State Department of Social Services, and  
PHILIP L. TOIA,

*Petitioners,**against*

JOANNE SWIFT, Individually and on behalf of her minor  
daughter, MICHELLE SWIFT, and on behalf of all other  
persons similarly situated,

*Respondents,*

LYLIA ROE, Individually and on behalf of her minor  
children, CAROL ROE and CHERYL ROE,

*Intervenor-Respondent.*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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**RESPONDENTS' BRIEF IN OPPOSITION**

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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1979  
NO. 79-101

BARBARA BLUM, Individually and as Commissioner of the New York State Department of Social Services, and PHILIP L. TOIA, Petitioners,

-against-

JOANNE SWIFT, Individually and on behalf of her minor daughter, MICHELLE SWIFT, and on behalf of all other persons similarly situated,

Respondents,

LYLIA ROE, Individually and on behalf of her minor children, CAROL ROE and CHERYL Roe,

Intervenor-Respondent.

---

On Petition For A Writ Of Certiorari To The  
United States Court of Appeals  
For The Second Circuit

---

#### RESPONDENTS' BRIEF IN OPPOSITION

---

The respondents respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Second Circuit's opinion in this case. The opinion of the Second Circuit is reported at 598 F.2d 312 (2d Cir. 1979).

#### QUESTION PRESENTED

Whether the Court of Appeals correctly held that the automatic reduction of AFDC assistance, when a non-legally responsible, self-maintaining individual resides with an AFDC family, violates the federal Social Security Act and implementing HEW regulations as construed in VanLare v. Hurley, 421 U.S. 338 (1975) and Lewis v. Martin, 397 U.S. 397 (1969).

#### REGULATIONS INVOLVED

Sections 233.20(a)(2)(viii) and 233.90(a) of Chapter II, Title 45 of the Federal Regulations provide in relevant part that:

"...the money amount of any item included in the standard will not be prorated or otherwise reduced solely because of the presence in the household of a non-legally responsible individual; and the agency will not assume any contribution from such individual for the support of the assistance unit." 45 C.F.R. §233.20(a)(2)(viii).

"nor may the state agency prorate or otherwise reduce the money amount for any item included in the standard on the basis of assumed contributions from non-legally responsible individuals living in the household." 45 C.F.R. §233.90 (a).

#### STATEMENT OF THE CASE

This action contests the validity of a New York Department of Social Services' policy of automatically prorating and thus automatically reducing an AFDC family's public assistance grant when a non-legally responsible, self-maintaining individual resides with the AFDC family. New York sought to carry out and defend this policy despite this Court's decisions in VanLare v. Hurley, 421 U.S. 338 (1975) and Lewis v. Martin, 397 U.S. 552 (1970), and despite the fact that the policy is specifically prohibited by HEW regulations, 45 C.F.R. §§233.20 (a)(2)(viii) and 233.90(a).

Respondent Swift and her minor daughter

are recipients of AFDC assistance. For a family of two with a rent of \$212 per month, New York generally provides a monthly assistance grant of \$362.\* However, pursuant to the contested policy, Ms. Swift and her daughter only receive AFDC assistance of \$289.34 per month (2/3 of a grant

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\* \$362 represent the basic standard of needs allowance for a family of two of \$150, plus a rental allowance of \$212. Section 131-a of the New York Social Services Law provides:

The following schedule shall be the standard of monthly need for determining eligibility for all categories of assistance in and by all social services districts:

Number of Persons In Household

One	Two	Three	Four	Five	Six
\$94	\$150	\$200	\$258	\$318	\$368

[This schedule does not include allowances for rent]."

Pursuant to 18 N.Y.C.R.R. §352.3(a), a family is entitled to an additional allowance for shelter. A family of two residing in Westchester County is entitled to a shelter allowance equal to the rent paid up to a maximum of \$212 per month.

for a family of three). The AFDC grant is reduced by \$72 per month solely because Ms. Swift's son, William Rooney, who receives support payments from his father, resides with Ms. Swift and her daughter. (5a-6a).\*

Similarly, the AFDC grant of respondent Roe and her two daughters was reduced by \$43.50 per month because her third daughter, Ann Marie, who receives in kind support from her father, resides in the home. (6a-7a). If William and Ann Marie moved out of their respective households, the Swift and Roe families would receive full grants of AFDC assistance.

Petitioners only discuss the validity of their policy as applied to self-maintaining children who receive support payments. The Courts below, however, found that

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\* References are to the Appendix to the Petition for a Writ of Certiorari.

petitioners were carrying out a policy of automatically prorating and reducing AFDC grants when "an individual, who has no legal obligation to support the AFDC family and who receives non-welfare income sufficient to meet his or her needs, resides with an AFDC family...." (Judgment of the District Court, entered December 15, 1978). (emphasis added).\* Thus, petitioners' policy is not limited to self-maintaining children, but includes any self-maintaining individual, and is not limited to that individual's receipt of support payments, but includes the receipt of any non-welfare income.

In two separate opinions rendered by

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\* The scope of the policy is reflected in the class certified by the district court. (14a). The petition for certiorari does not contest the class certified by the district court or the findings by the courts below as to the nature or scope of the contested policy.

the district court, and in an opinion by the Court of Appeals, petitioners' policy was found to conflict with the federal Social Security Act and implementing HEW regulations. Swift v. Toia, 598 F.2d 312 (2d Cir. 1979), aff'g, 450 F.Supp. 983 (S.D.N.Y. 1978) and 461 F.Supp. 578 (S.D. N.Y. 1978). (1a-30a). Each decision fully considered petitioners' contentions and found them foreclosed by the applicable HEW regulations and by this Court's decision in VanLare v. Hurley, 421 U.S. 338 (1975).

The decision of the court of appeals only prohibits petitioners from automatically prorating and reducing the AFDC grant when an individual, who has no legal obligation to support the AFDC family and who receives non-welfare income sufficient to meet his or her needs, resides with the AFDC family. Petitioners are not prohibited from reducing the AFDC grant after determining "(1)

the actual amount of contributions, if any, that the AFDC household receives from the non-legally responsible person who resides in the AFDC household, or (2) the actual amount of decreased need, if any, of the AFDC household, resulting from the presence of the non-legally responsible person."

(Judgment of the District Court, entered December 15, 1978, p.4).\* In addition, the judgment does not enjoin petitioners from enforcing any State statute or regulation, but only the policy of automatic proration.

Petitioners have made no attempt to demonstrate that this case meets any of this Court's criteria for the granting of

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\* The decision below simply requires petitioners to make the necessary determinations. Neither the judgment of the district court nor the opinions below place an evidentiary burden on petitioners when they make this determination. See Point iv, infra.

certiorari. U.S. Sup. Ct. Rule, 19. Petitioners have made no attempt to show that the decision of the Court of Appeals is in conflict with the decision of another court of appeals, that it conflicts with applicable decisions of this Court, or that the case presents a substantial question of recurring importance. Petitioners have not cited even one decision that supports the validity of their policy.

Rather, petitioners make the unfounded, unsubstantiated and exaggerated claim that the decision below will create an "administrative nightmare" and will require the expenditure of "prohibitive" costs. (Petition for a Writ of Certiorari, pp. 9, 13).

Similar claims were made by the petitioners

in VanLare v. Hurley, supra.\* They were not relevant in that case. They are not relevant here.

The decision of the court below is in accord with this Court's decisions in VanLare v. Hurley, supra, and Lewis v. Martin, supra, is mandated by the applicable HEW regulations, 45 C.F.R. §§233.20 (a)(2)(viii) and 233.90(a), and is consistent with the decisions of the other circuits. See Hoehle v. Likins, 538 F.2d 229 (8th Cir. 1976), aff'g, 405 F.Supp. 1167 (D.Minn. 1975); Houston Welfare Rights Org. v. Vowell, 555 F.2d 1219 (5th Cir. 1977), rev'd and remanded on other grounds,

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\* In VanLare v. Hurley, supra, the State Commissioner argued that "were the decision of the three-judge district court to be affirmed, appellants estimate that they would be obliged to increase shelter allowance payments by approximately \$6.2 million annually." Reply Brief for Appellants in VanLare v. Hurley, p. 7, fn.

99 S.Ct. 1905 (1979); Reyna v. Vowell, 470 F.2d 494 (5th Cir. 1972). See also, Gilliard v. Craig, 331 F.Supp. 587 (W.D. N.C. 1971)(three-judge court), aff'd, 409 U.S. 807 (1972). In addition, petitioners continue to defend the validity of their policy in this Court despite the fact that it has been held invalid as a matter of state law by the New York State courts. Snowberger v. Toia, 46 N.Y.2d 803 (1978); Nelson v. Toia, 92 Misc.2d 575 (N.Y.Sup.Ct.), aff'd, 60 App.Div.2d 796 (4th Dept. 1977), mot. for lv.to app.den., 44 N.Y.2d 646 (1978). Accord, Genin v. Toia, N.Y.2d (July 3, 1979).\* Plenary review is thus clearly unwarranted.

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\* The decision in Genin v. Toia, is reproduced in Appendix "A" to this Brief.

REASONS WHY THE WRIT SHOULD BE DENIED

I. THE CONTESTED POLICY VIOLATES EXPLICIT HEW REGULATIONS AND THIS COURT'S DECISIONS IN VANLARE v. HURLEY, 421 U.S. 338 (1975) AND LEWIS v. MARTIN, 397 U.S. 552 (1970).

The primary purpose of the AFDC program is the protection of needy and dependent children. King v. Smith, 392 U.S. 309 (1968). This Court and HEW have consistently recognized that state policies which work an automatic reduction of AFDC benefits because of the presence in the home of a non-legally responsible person frustrate this purpose because they are based on assumed rather than the actual availability of income. VanLare v. Hurley, 421 U.S. 338 (1975); Lewis v. Martin, 397 U.S. 552 (1970).

The courts below correctly found that the contested State policy violates the express terms of two HEW regulations. HEW regulations specifically provide that "the

money amount of any item included in the standard will not be prorated or otherwise reduced solely because of the presence in the household of a non-legally responsible individual, ...." 45 C.F.R. §233.20 (a) (2)(viii). They also provide that the states may not "prorate or otherwise reduce the money amount for any item included in the standard on the basis of assumed contributions from non-legally responsible individuals living in the household." 45 C.F.R. §233.90(a).

In its preamble to these regulations, HEW explained that they were mandated by this Court's decision in VanLare v. Hurley, supra, and that it was necessary to specifically prohibit proration because "prorating the standard of need is another form of assumption of income from non-legally responsible individuals which has long been prohibited by federal regulations and

by the U.S. Supreme Court in case of King v. Smith, Lewis v. Martin, et al." 42 Fed.Reg. 6583 (Feb. 3, 1977). In addition, HEW made it clear that its regulations apply to all shared households and not just to those containing a "man-in-the-house" or a "lodger." Id. "In VanLare, only one of the three petitioners could be considered to be sharing living arrangements with a man-in-the-house; of the other two, one was sharing with a sister, one with an adult son." Id.; VanLare v. Hurley, supra, at 340, n.1.

This Court's decision in VanLare v. Hurley, supra, is therefore clearly controlling in the instant case. As in VanLare, the vice of the contested policy herein is New York's automatic reduction of the AFDC grant because of the presence of a self-maintaining, non-legally responsible person in the AFDC household,

without determining whether or not that person is using his or her income for shared household expenses, or whether or not the household's needs have decreased.

Petitioners attempt to distinguish VanLare by asserting that, in the case at bar, petitioners only presume contribution when the non-legally responsible individual actually has income. But whether or not the "lodger" had income was irrelevant to this Court's decision in VanLare. Rather, the New York "lodger" regulations were held invalid in VanLare because they were "based on the assumption that the non-paying lodger is contributing to the welfare household, without inquiry into whether he in fact does so." VanLare v. Hurley, supra at 346. (emphasis added). Moreover, in Lewis v. Martin, supra, this Court held that the income of a person with no legal obligation to support the AFDC family cannot, absent proof of actual

contributions, serve as a basis for the reduction of the AFDC grant. And, in Gilliard v. Craig, 409 U.S. 807 (1972), aff'g, 331 F.Supp. 587 (W.D.N.C. 1971), this Court affirmed a decision of a three-judge district court which held that the states may not assume that support payments of a non-needy child are available to meet the needs of the AFDC family with whom he resides. See also, Johnson v. Harder, 383 F.Supp. 174 (D.Conn. 1974), aff'd, 512 F.2d 1188 (2d Cir. 1975), cert. denied, 423 U.S. 876 (1975).

The harm caused by automatic proration is well illustrated by the case of respondent Roe, whose daughter Ann Marie receives in kind support, rather than cash, from her father. As the district court stated:

"the lack of inquiry as to actual contribution to the [Roe] household may result in genuine hardship to the AFDC recipients where the non-AFDC child is supported in kind rather than

with funds. For example, if Ann Marie's father provides her monthly with actual items of food and clothing, but no monetary sum that is actually contributed to the AFDC unit, it is wholly artificial to maintain that the cost of running a four-person household is reduced by one quarter, i.e., \$112.50 per month, Ann Marie's state determined total needs as 1 person of 4. In such an instance, reality dictates that the remaining family members, the AFDC household of three, require a full shelter allowance for three people in addition to a basic needs allowance for three people." Swift v. Toia, 461 F.Supp. 578, 583 (S.D.N.Y. 1978). (12a-13a).

Moreover, "there are undoubtedly countless factual permutations among the class members where the non-AFDC child's support arrangement consists of support in kind only, or support which is given partially in kind and partially in funds, or simply support in whatever monetary amount an absent parent can spare on a monthly basis." Swift v. Toia, supra at 583. (13a).

Since the decision of the Court of

Appeals merely held that the contested state policy violated explicit federal regulations, plenary review should be denied. Gilliard v. Craig, 331 F.Supp. 587 (W.D.N.C. 1971), aff'd, 409 U.S. 807 (1972); Hausman v. Department of Institutions and Agencies, 64 N.J. 203, 314 A.2d 362, cert. denied, 417 U.S. 955 (1974).

II. THE DECISION OF THE COURT OF APPEALS IS IN ACCORD WITH THE DECISIONS OF THE LOWER FEDERAL AND STATE COURTS.

The decision of the Court of Appeals simply follows a consistent line of federal and state court decisions.

The decision of the Second Circuit is in accord with the decisions of all of the Circuits which have considered the issue. Hoehle v. Likins, 538 F.2d 229 (8th Cir. 1976), aff'g, 405 F.Supp. 1167 (D.Minn. 1975); Houston Welfare Rights

Org. v. Vowell, 555 F.2d 1219 (5th Cir. 1977), rev'd and remanded on other grounds, 99 S.Ct. 1905 (1979); Reyna v. Vowell, 470 F.2d 494 (5th Cir. 1972); Rodriguez v. Vowell, 472 F.2d 622, 627 (5th Cir.), cert. denied, 412 U.S. 944 (1973); Roselli v. Affleck, 508 F.2d 1277, 1282 (1st Cir. 1974). It is also consistent with all of the applicable decisions of the federal district courts, Mothers and Childrens Rights Org. v. Stanton, 371 F.Supp. 298 (N.D.Ind. 1973); Howard v. Madigan, 363 F.Supp. 351 (D.S.D. 1973); Gilliard v. Craig, 331 F.Supp. 587 (W.D.N.C. 1971), aff'd, 409 U.S. 807 (1972); Jenkins v. Georges, 312 F.Supp. 289 (W.D.Pa. 1969) (three-judge court), and the highest courts of New Jersey, Hausman v. Department of Institutions and Agencies, 64 N.J. 203, 314 A.2d 362, cert. denied, 417 U.S. 955 (1974); and New York, Snowberger v. Toia,

46 N.Y.2d 803 (1978); Matter of Nelson v. Toia, 92 Misc.2d 575 (N.Y. Sup.Ct.), aff'd, 60 A.D.2d 796 (4th Dept. 1977), mot. for lv. to app. den., 44 N.Y.2d 645 (1978). There are no decisions in conflict with that of the court below.\*

III. PLENARY REVIEW IS UNWARRANTED BECAUSE THE CONTESTED POLICY HAS BEEN HELD INVALID AS A MATTER OF STATE LAW.

Petitioners continue to defend their

\* Padilla v. Wyman, 34 N.Y.2d 36, appeal dismissed, 419 U.S. 1084 (1974) deals with the distinguishable "cooperative budgeting" situation of two welfare families who reside in the same residence. The New York State Court of Appeals ruled that the State regulation governing that situation did not violate the equal protection clause. The Court of Appeals clearly distinguished the case of two welfare families living together from the instant case of a non-recipient residing with a welfare family. Padilla v. Wyman, supra at 421. This Court's summary dismissal of the appeal in Padilla only indicates this Court's agreement with that specific holding. Illinois State Board of Elections v. Socialist Workers Party, 99 S.Ct. 983, 989-990 (1979).

policy in this Court despite the fact that it has been held invalid as a matter of state law by the New York State courts. Snowberger v. Toia, 46 N.Y.2d 803 (1978), aff'g, 60 App.Div.2d 783 (4th Dept. 1977); Nelson v. Toia, 92 Misc.2d 575, aff'd, 60 App.Div.2d 796 (4th Dept. 1977), leave to app. den., 44 N.Y.2d 646 (1978). Accord, Genin v. Toia, N.Y.2d (July 3, 1979).\* In Nelson v. Toia, supra, the precise policy at issue in the instant case was held invalid as a matter of state law as applied to facts literally indistinguishable from those involved herein. The New York State courts have consistently invalidated petitioners' repeated efforts to impose automatic proration schemes. Matter of Zaccheo v. Toia, 65 App.Div.2d 624 (2d Dept. 1978); Gabel v. Toia, 64 App.Div.2d 267 (4th Dept. 1978); Foran v. Dimitri, 62 App.Div.2d 1124 (3d Dept. 1978), leave to appeal denied, 45 N.Y.2d 706 (1978); Edwards v. Toia,

\* A copy of the decision in Genin v. Toia, is reproduced in Appendix "A" to this Brief.

61 App.Div.2d 1089 (3d Dept. 1978), leave to appeal denied, 44 N.Y.2d 649 (1978); DeRocha v. Berger, 55 App.Div.2d 1042 (4th Dept. 1977); Johnson v. Toia, 55 App.Div.2d 1043 (4th Dept. 1977).

The courts below correctly determined that the contested policy is prohibited by federal law. (Point I, supra). But regardless of the validity of the policy under federal law, petitioners are precluded from applying the policy as a matter of state law. This provides a dispositive reason for denying plenary review.

IV. THE DECISION BELOW ONLY REQUIRES PETITIONERS TO MAKE INDIVIDUAL DETERMINATIONS THAT THE SELF-MAINTAINING INDIVIDUAL'S INCOME WAS APPLIED TO SHARED HOUSEHOLD NEEDS. IT DOES NOT PLACE AN EVIDENTIARY BURDEN ON THE STATE.

Petitioners contend that the decision below places an evidentiary burden on the State to show that the self-maintaining individual's income was applied to shared

household needs, and that this burden should be placed on the recipient. (Petition for Writ of Certiorari, pp. 11-12). This is an erroneous view of the decision of the Court of Appeals.

This action only challenged the validity of petitioners' policy of automatically prorating AFDC grants without making any determination of whether the self-maintaining individual's income was being used for shared household expenses. As the Court of Appeals concluded, "[t]he State did not make an individual determination as to either named plaintiff that her child's income was applied to shared household expenses." (3a).

The decision of the court below simply requires that petitioners make this determination as a prerequisite to proration. Neither the judgment of the district court or any of the opinions of the courts below

place an evidentiary burden on petitioners  
when they make the necessary determination.  
That question is simply not in issue in  
this case.

CONCLUSION

For the foregoing reasons, it is  
respectfully submitted that the petition  
for a writ of certiorari should be denied.

**APPENDIX**

Dated: August 8, 1979 Respectfully submitted,  
New Rochelle, NY

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Appendix "A"

STATE OF NEW YORK  
COURT OF APPEALS

\* \* \* \* \*

In the Matter of DEBORAH GENIN,

Appellant,

vs.

PHILIP L. TOIA, as Commissioner  
of the New York State Department  
of Social Services, et al.,

Respondents.

\* \* \* \* \*

MEMORANDUM:

The order of the Appellate Division  
should be reversed, with costs, and sup-  
plementary grant of public assistance in  
the category of Aid to Dependent Children  
to petitioner should be reinstated.

The Commissioner of the State Depart-  
ment of Social Services erred in prorating  
household expenses between petitioner and  
her nine-year-old child, a recipient of  
Social Security survivors' benefits. A  
child's Social Security benefits may not

be deemed available income for the purpose  
of determining eligibility for Aid to  
Dependent Children when such benefits are  
sufficient to satisfy the needs of the  
child and the representative payee does not  
choose to include the child within the AFDC  
assistance unit. (See Johnson v. Harder,  
383 F.Supp. 174, aff'd, 512 F.2d 1188,  
cert. den., 423 U.S. 876; Howard v. Madigan,  
363 F.Supp. 351; Matter of Nelson v. Toia,  
92 Misc.2d 575, aff'd, 60 A.D.2d 796, mot.  
for lv. to app.den., 44 N.Y.2d 646; Matter  
of Snowberger v. Toia, 60 A.D.2d 783, aff'd,  
46 N.Y.2d 803.)

\* \* \* \* \*

Order reversed, with costs, and supplementary  
grant of public assistance in the category  
of Aid to Dependent Children reinstated in a  
memorandum. Concur: Cooke, Ch. J., Jasen,  
Gabrielli, Jones, Wachtler, Fuchsberg

Decided July 3, 1979